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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-220

PHELPS DODGE CORPORATION, *Petitioner,*

v.

AFL-CIO JOINT NEGOTIATING COMMITTEE FOR PHELPS DODGE, et al., *Respondents.*

No. 72-359

NATIONAL LABOR RELATIONS BOARD, *Petitioner,*

v.

AFL-CIO JOINT NEGOTIATING COMMITTEE FOR PHELPS DODGE, et al., *Respondents.*

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

When this case began, it appeared to pose a legal issue of great significance to the future course of collective bargaining in the United States. But neither the Board nor the court below reached or decided that issue. Nevertheless, in No. 72-220, the Company seeks to have this Court decide that issue. In No. 72-359, the Board seeks to have this Court rule upon a different legal theory, one which formed no part of the Board's decision, which made its first appearance in the Board's appellate brief, and which was not considered

by the court below because it constituted an effort by Board counsel at *post-hoc* rationalization of the Board's decision.

The rocky litigation path leading to this confused denouement can be retraced quickly.

I

This case arose out of an effort by unions representing employees in several of the Company's bargaining units to secure a synchronization of their separate collective bargaining agreements to the limited extent necessary to enable employees in the several units to strike at the same time. The unions hoped to end a history of impotence resulting from fragmented bargaining power: whenever employees in one unit were free to strike for improved benefits, their fellow employees in other units were under contractual no-strike prohibitions and thus could not strike in their support. In an effort to gain a modicum of bargaining power, the unions sought contractual modifications which would preserve the statutory right of employees in each unit to strike in support of their fellow employees in other units. *Houston Insulation Contractors Association* v. *NLRB,* 386 U.S. 664, 668-669 (1967).

The Company filed charges with the Board alleging that the unions' demands for synchronization were non-mandatory subjects of bargaining, and that by insisting upon them to impasse and striking in support of them the unions were violating Section 8(b)(3) of the Act, 29 U.S.C. § 158(b)(3). While the unions believe that their demands were clearly mandatory subjects of bargaining,[1] there is no ques-

[1] *Houston Insulation Contractors Association* v. *NLRB, supra, NLRB* v. *Insurance Agents International Union,* 361 U.S. 477 (1960); *U.S. Pipe and Foundry Co.* v. *NLRB,* 298 F.2d 873 (5th Cir. 1962); *Lynchburg Foundry Co.* v. *NLRB,* — F.2d —, 80 LRRM 2415, (4th Cir. 1972); *NLRB* v. *Peter Cailler Kohler Swiss Chocolate Co.,* 130 F.2d 503, 505-506 (2d Cir. 1942); *NLRB* v. *General Drivers,* 225 F. 2d 205, 210 (5th Cir. 1955); *NLRB* v. *Landis Tool Co.,* 193 F.2d 279, 282-283 (3rd Cir. 1952); *Dolly Madison Industries,* 182 NLRB No. 147, 74 LRRM 1230 (1970).

tion but that the ultimate resolution of this issue is one of great importance.

The Board, however, did not reach or decide this issue. Instead, it found as a fact that the unions in the Western Operations had also made *another* demand—that the Company discuss with them the benefits to be extended to the non-Western bargaining units—and held that *this* demand was violative of Section 8(b)(3).[2]

The unions petitioned for review, contending that the Board's factual finding was wholly without record support. The court below agreed (A11-A13):

> "We find that the Board's opinion and order are not substantiated by the record . . .
>
> * * * * *
>
> "Separate negotiations were conducted at each of the company's units. No bargaining was conducted at any unit with regard to wages, terms, or employment conditions at other locales.
>
> * * * * *
>
> "We conclude from this record that in the Arizona

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[2] "The Trial Examiner found, and we agree, that one of the Respondents' primary objectives throughout the course of bargaining at the Charging Party's Arizona operations was to obtain agreement on terms and conditions of employment to be applicable generally on a companywide basis, and that the strikes conducted by the Respondents throughout the Charging Party's facilities were intended, in substantial part, to force the Charging Party to accede to the Respondents' demands for such a companywide agreement. The record as a whole amply supports this conclusion.

* * * * *

"Accordingly, we find that the Respondents, by demanding that the Charging Party engage in companywide bargaining, beyond the scope of established bargaining units, and by striking in support of its demands, has violated Section 8(b)(3) of the Act." (A15, A19).

> negotiations petitioner unions did not insist that Phelps Dodge agree to terms and conditions of employment to be applicable generally to other bargaining units and that they did not strike to enforce such a demand."[3]

In their brief to the court below, Board counsel had sought to justify the Board's decision on an alternative ground. Conceding that perhaps there was no record evidence for the Board's finding that the unions in Western Operations had sought to negotiate for other units, Board counsel reasoned that the decision ought to be sustained anyway, for the "practical effect" of what the unions had actually done was no different from what the Board had erroneously found them to have done. Specifically, Board counsel argued that where unions in separate negotiations seek the same benefits, and each declares that it will continue striking in support of the others, the "practical effect" is the same as if one union had insisted upon negotiating the benefits for all units.

The court below expressly refrained from adjudicating this claim—the same claim which the Board now advances to this Court—because it was not the basis for the Board's decision but constituted merely "counsel's *post hoc* rationalizations for agency action" (A10):

> "We reiterate in order to emphasize the fact that the Board opinion and order must stand or fall upon the findings of fact and conclusions of law contained therein. In the instant case, counsel for the Board has advanced an argument in support of the Board's order

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[3] The Board's petition (p. 10) twice states that it is "undisputed" that the Unions "insist[ed] that the terms negotiated in one unit be extended to the other units." On the contrary the unions have disputed this throughout, and the court below found the record devoid of evidence of any such insistence (A11-A13).

that is really a rationalization of the Board's decision.[6] We may not consider such an argument. '[A]n administrative order cannot be upheld unless the grounds upon which the agency acted * * * were those upon which its action can be sustained.' SEC v. Chenery Corp., 318 U.S. 80, 95 (1943). We cannot accept counsel's *post hoc* rationalizations for agency action. NLRB v. Metropolitan Life Insurance Co., 380 U.S. 438 (1965).

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[6] The Board's brief argues that the effect of the demands made by the unions would be that employees in other units would receive the same terms and conditions as the employees in the Western Operations. The argument contends that, as a practical matter, the result would be the same as if the unions had negotiated for other units in the Western Operations negotiations. Since such an instance would have been violative of the Act, the Board's counsel contends that a course of conduct that is designed to achieve the same result is likewise violative. This was clearly not the import of the Board's decision, which found that the unions did seek to negotiate about terms and conditions in other units."

Finally, the court below reached the issue which the Board had avoided—whether the demands admittedly advanced by the unions were mandatory subjects of bargaining—and held that they were (A12-A13).

The Board petitioned for modification of the decision below, requesting that the court delete its holding that the unions' demands were mandatory subjects of bargaining. The Board's petition explained (p. 5):

> "The issue as to whether the demands . . . are mandatory or non-mandatory subjects of bargaining under the Act is a significant one, whose outcome may have a substantial impact on labor relations throughout the country. If, as we submit, the Board did not specifically pass upon, nor did Board counsel brief, that issue, we urge the Court to defer definitely deciding the matter until the Board has done so."

The Court below granted the Board's petition, and modified its opinion by deleting the holding that the unions' demands were mandatory subjects of bargaining (A12-A13).

II

As the foregoing account of the history of this litigation makes clear, the court below did not reach or decide the issues presented in either of the petitions for certiorari.

The lone question presented in the Company's petition (No. 72-220) is whether the unions' demand for simultaneous settlement is a mandatory subject of bargaining. But as the Board's petition for modification acknowledged, "the Board did not specifically pass upon, nor did Board counsel brief, that issue," and although the court below originally resolved that issue in the unions' favor, it granted the Board's request to modify its opinion and delete that holding.

The lone question presented in the Board's petition (No. 72-359) is whether the Board may invalidate assumedly mandatory bargaining demands where the practical effect of such demands is the same as if the unions in one unit had sought to negotiate terms applicable to other units. (Board petition, pp. 2, 11-12). The court below expressly refused to reach or decide that issue, declaring that it was not the basis for the Board's decision and constituted merely a *post-hoc* attempt by Board counsel to rationalize a Board decision actually predicated upon a different ground (A10, and n. 6 thereat).

CONCLUSION

The only issue actually decided below was a factual one: whether the unions in Western Operations had insisted that the Company bargain with them about non-Western units. The Board found that they had, but the court below held this finding to be without evidentiary support. This "substantial evidence" ruling hardly warrants this Court's attention and, not surprisingly, neither petition seeks review of it.

As to the more important issues which hovered over this case throughout but emerged undecided, we can add nothing to the point made so persuasively by the Board in its petition for modification below (p. 5): "[W]e urge the Court to defer definitively deciding the matter until the Board has done so."

Respectfully submitted,

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